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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

JACK R. HUGHES and MERLE A. PETTIT,

Petitioners,

v.

GENERAL MOTORS CORPORATION, a Delaware Corporation, THE GENERAL MOTORS RETIREMENT PROGRAM FOR SALARIED EMPLOYEES, and THE FINANCE COMMITTEE OF GENERAL MOTORS CORPORATION, jointly and severally,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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January 27, 1989

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QUESTIONS PRESENTED

1. Whether federal courts have subject matter jurisdiction over common law claims such as those raised by Petitioners.

2. Whether claims alleging that participants would have been eligible for increased pension benefits but for actions taken by them in reliance on material misrepresentations made to the participants by persons in fiduciary capacities are cognizable under the Employee Retirement Income Security Act of 1974 (ERISA).

3. Whether the enactment of ERISA, with its broad preemptive scope, extinguished all remedies for fraud and/or misrepresentation regarding the availability of pension benefits which otherwise would have been available under state law without creating a parallel federal remedy.

4. Whether a decision to retire "voluntarily" in reliance upon material misrepresentations regarding the availability of special early retirement benefits constitutes a constructive discharge thereby establishing the basis for a claim of interference with protected rights under section 510 of ERISA, 29 U.S.C. § 1140.

5. Whether a federal common-law remedy is available to Petitioners to replace those state common-law remedies extinguished by the enactment of ERISA.

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GENERAL MOTORS CORPORATION, a Delaware Corporation, THE GENERAL MOTORS RETIREMENT PROGRAM FOR SALARIED EMPLOYEES, and THE FINANCE COMMITTEE OF GENERAL MOTORS CORPORATION, jointly and severally,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners Jack R. Hughes and Merle A. Pettit respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this matter on July 14, 1988, affirming the trial court's order granting defendants' motion for summary judgment.

OPINION BELOW

The opinion of the Court of Appeals (Appendix A) is not officially reported. The opinion and order granting Respondents' motion for summary judgment (Appendix D) and the opinion and order denying the motion for rehearing (Appendix E) rendered by the United States District Court for the Western District of Michigan also are not officially reported.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on July 14, 1988 (Appendix A). A timely petition for rehearing and suggestion for rehearing en banc was denied on August 30, 1988 (Appendix B). On November 17, 1988, Mr. Justice Scalia signed an order extending the time for filing this petition for certiorari until January 27, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29:

§ 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. . . .

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought –

(1) by a participant or beneficiary –

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan. . . .

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

§ 1140. Interference with protected rights

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C.A. § 301 et seq.], or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act. The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

§ 1144. Other laws

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section

1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

STATEMENT OF THE CASE

In early 1980, Petitioners, both of whom were fifty-six years old and were long time employees of the Oldsmobile Division of General Motors Corporation, sought information regarding retirement under the General Motors Retirement Program for Salaried Employees (hereinafter "the Plan"), an ERISA pension benefit plan. The information was sought from Robert Shong, the Oldsmobile personnel department employee responsible for providing such information to salaried employees. Among the information sought was whether Oldsmobile would offer special early retirement benefits to salaried employees. Special early retirement benefits afforded substantially greater benefits than regular retirement benefits to participants. Under the terms of the Plan, the offering of these benefits was an option available to General Motors. These benefits already had been offered at several other divisions of General Motors during the relevant time period.

Petitioners inquired into the potential offering of special early retirement benefits on several occasions. On each such occasion, they were told that no special early retirement benefits would be offered at Oldsmobile. These inquiries were made as late as mid-April, 1980 by Mr. Pettit and April 30, 1980 by Mr. Hughes. Relying on the representations that no special early retirement benefits would be offered, both Petitioners retired on May 1,

1980. However, had Petitioners decided to postpone their retirement, that decision apparently could have been made as late as May 1, 1980 allowing Petitioners to remain as active full-time salaried employees.

Petitioners were not told, however, that serious consideration was being given to offering special early retirement benefits at the Oldsmobile Division. On April 22, 1980, a decision was made to offer special early retirement benefits to fifty-eight and fifty-nine year old salaried employees. This information was not given to Petitioners. Robert Shong, who himself was fifty-six years old at the time, testified at his deposition that this offering was significant because it made it a possibility that the benefits would be extended to the younger age group (Deposition of Robert Shong at 43-44; Court of Appeals Joint App. (JA) at 108). In essence, Mr. Shong admitted that this was material information.

Mr. Shong also testified that he was not aware of this decision until after Petitioners' retirement. (Deposition of Robert Shong at 122; JA at 112). However, Mr. Shong's superior, David Schmidt, testified that it was "inconceivable" that Mr. Shong would not have known about this at least prior to the April 28, 1980 (Deposition of David Schmidt at 142; JA at 178). According to the testimony of his supervisors, Mr. Shong would have been involved in the preparation of the proposal to offer these benefits which eventually was approved on March 22, 1980 (Deposition of David Schmidt at 138; JA at 174).

Mr. Shong testified that information regarding a potential offering of special early retirement benefits was to be held "in strictest confidence." (Deposition of Robert

Shong at 112; JA at 111). Petitioners alleged that, had they been given the information available to Mr. Shong before their retirements became final, they would have postponed their retirements until a final decision on special early retirement benefits for their age group was made. Had they waited, they would have been offered these benefits in May, 1980, along with other then current salaried employees in their age group, such as Robert Shong.

Petitioners invoked the jurisdiction of the district court pursuant to section 502(e)(1) of ERISA, 29 U.S.C. § 1132(e)(1), and the general federal jurisdiction statute, 28 U.S.C. § 1331. On March 24, 1987, the district court granted Respondents' motion for summary judgment and dismissed Petitioners' complaint holding that Petitioners did not have standing under ERISA since the special early retirement benefits were not offered to their age group until after they retired and that Petitioners therefore were not "participants" within the meaning of ERISA.

On appeal, the Court of Appeals for the Sixth Circuit rejected the district court's holding that Petitioners were not participants but affirmed the district court's judgment, holding instead that the claims raised by Petitioners, sounding in misrepresentation, were not cognizable under ERISA and that federal courts did not have subject matter jurisdiction over Petitioners' claims. The Court of Appeals held that there was no fiduciary duty to inform Petitioner about potential offers of special early retirement benefits, stating:

> If the fiduciary had a duty not to deceive plaintiffs as to what was being contemplated in the way of future amendments to the terms of the plan, the duty arose

> under the common law of the State of Michigan; it did not arise under the terms of the plan itself, or under the terms of the federal statute prescribing the standards under which the fiduciary's duties with respect to the plan were to be discharged.

Hughes v. General Motors Corporation, No. 87-1506, Slip op. at 11 (6th Cir., July 14, 1988) (App. A at App. 12-13). The Sixth Circuit did not consider the existence of a federal common law remedy.

REASONS FOR GRANTING THE WRIT

This case involves a claim of misrepresentation regarding the availability of pension benefits and raises the question of whether *any* remedies exist for plan participants who claim they were misled by their employer into retiring before they become available for additional retirement benefits. Petitioners brought claims for breach of fiduciary duty under section 404 of ERISA, 29 U.S.C. § 1104, for recovery of benefits under section 502 of ERISA, 29 U.S.C. § 1132, and for damages for interference with protected rights under section 510 of ERISA, 29 U.S.C. § 1140. The gravamen of all of Petitioners' claims was that material misrepresentations were made to them by persons in fiduciary positions, that they relied on these misrepresentations and retired on May 1, 1980 and thereby were deprived of the opportunity to receive increased retirement benefits. In light of the fact that this matter is before the Court seeking review of the granting of summary judgment against Petitioners, all reasonable inferences drawn from the underlying facts must be viewed in the light most favorable to Petitioners. *United*

States v. Diebold, Inc., 369 U.S. 654, 655; 82 S. Ct. 933, 944 (1962). Petitioners submit that there are genuine issues of material fact in the record which should have precluded the granting of the motion. In addition, the Petitioners submit that the lower courts' interpretations of ERISA were in error. In essence, Petitioners contend that federal courts do have subject matter jurisdiction over their claims.

1. Federal courts have subject matter jurisdiction over Petitioners' claims

The Sixth Circuit's affirmance of the trial court's grant of summary judgment against Petitioners was based on a determination that federal courts do not have subject matter jurisdiction over Petitioners' claims. *Hughes*, No. 87-1506, slip op. at 8-11 (App. A at App. 9 - App. 13). This conclusion is contrary to the express terms of ERISA as well as this Court's decisions.

Section 514(a) of ERISA, 29 U.S.C. § 1144(a) indicates that "any and all State laws" relating to employee benefit plans are superseded by ERISA. This Court has made it clear that the preemptive scope of ERISA is "deliberately expansive and designed to 'establish pension plan regulation as exclusively a federal concern.' " *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45; 107 S.Ct. 1549, 1552 (1987), *quoting Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523; 101 S.Ct. 1895, 1906 (1981).

Pursuant to section 502(e)(1) of ERISA, 29 U.S.C. § 1132(e)(1), federal courts have subject matter jurisdiction over all claims brought under ERISA, with exclusive jurisdiction over all claims not brought directly under the

plan. Federal courts have concurrent jurisdiction with state courts over claims brought directly under a plan. Michigan courts have held that common law claims which relate to pension plans, such as estoppel and misrepresentation, are within the exclusive jurisdiction of federal courts. *McMartin v. Central States, Southeast and Southwest Areas Pension Fund,* 159 Mich. App. 1; 406 N.W.2d 219 (1987). In fact, Petitioner Hughes' original state law complaint was dismissed for lack of subject matter jurisdiction because of ERISA's broad preemptive scope. *Hughes v. General Motors Corporation,* Case No. 81-27437-CK (Ingham County, Michigan, Circuit Court, June 4, 1984).

The Sixth Circuit's ruling that there is no federal subject matter jurisdiction deprives Petitioners of any remedy. Petitioners have been told they cannot bring their claims in state court and now are told they cannot be brought in federal court either. The broad preemptive scope of ERISA must be accompanied by an equally broad grant of subject matter jurisdiction either directly under ERISA or pursuant to the general federal question jurisdiction statute, 28 U.S.C. § 1331. In either event, the Sixth Circuit's ruling should be reversed so that the remedial purposes of ERISA are not violated.

2. The decisions of the circuits are in conflict with regard to the ultimate effect of ERISA's broad preemptive scope

The Sixth Circuit's decision in the instant case evidences the conflict and confusion which exists among the circuits with regard to the ultimate effect of ERISA's broad preemptive scope. Clearly, Petitioners' claims are

preempted by ERISA since they relate to pension plans and the duties which ERISA places on plan fiduciaries. Some federal remedy must be available.

When the Sixth Circuit's decision in the instant case is compared with opinions issued by other circuits, the confusion which exists regarding the ultimate effect of ERISA's broad premptive scope is clear. In *Carl Colteryhan Dairy, Inc. v. Western Pennsylvania Teamsters and Employers Pension Fund,* 874 F.2d 113 (3d Cir. 1988), the Third Circuit held that an employer had a federal common law fraud claim against a multiemployer plan "in order to effectuate Congress' intent to preempt the area . . . and create a comphrehensive federal scheme." 847 F.2d at 121. This holding is in direct conflict with the Sixth Circuit's refusal to fashion a federal common law remedy to replace Petitioners' lost state common law rights. Surprisingly enough, the Sixth Circuit itself has acknowledged the propriety of fashioning a federal common law remedy in such a situation, *Kentucky Laborers District Council Health and Welfare Fund v. Hope,* 861 F.2d 1003 (6th Cir. 1988), but refused to apply that reasoning in the instant case. In light of Congress' expressed intention that a "comprehensive federal scheme" be fashioned to effectuate ERISA's remedial purposes and this Court's clear holdings to that effect, the Court should agree to hear this matter to clarify the scope and effect of ERISA's preemption of state common law claims.

3. It is improper to use ERISA to extinguish all remedies for the wrongs alleged by Petitioners

There is no dispute that ERISA was enacted to achieve a broad remedial purpose, i.e., to protect the

rights and interests of participants and beneficiaries of employee benefit plans and to regulate the plans. *See* ERISA, section 2, 29 U.S.C. § 1001; *Pilot Life*, 481 U.S. at 55; 107 S.Ct. at 1557.

This Court and lower courts have recognized this broad remedial purpose. As Justice Brennan stated: "courts must always bear in mind the ultimate consideration whether allowance or disallowance of particular relief would best effectuate the underlying purposes of ERISA – enforcement of strict fiduciary standards of care in the administration of all aspects of pension plans and promotion of the best interests of participants and beneficiaries." *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 158; 105 S. Ct. 3085, 3099 (1985) (Brennan, J., concurring). As the Court of Appeals for the Second Circuit has stated: "ERISA is . . . a remedial statute, the coverage of which should be liberally construed, and exemptions from which should be confined to their narrow purposes." *Rose v. Long Island R.R. Pension Plan*, 690 F.2d 49, 54 (2d Cir. 1982), *cited in Kross v. Western Elec. Co.*, 701 F.2d 1238, 1242 (7th Cir. 1982). *See also Smith v. CMTA-IAM Pension Trust*, 746 F.2d 587, 589 (9th Cir. 1984).

Against this background, Congress has injected another aspect of ERISA which must be considered – preemption. Pursuant to section 514(a) of ERISA, 29 U.S.C. § 1144(a), the state common law claims which could have been raised by Petitioners are preempted by ERISA. *Pilot Life*, 481 U.S. at 47; 107 S. Ct. at 1553. The broad preemptive scope of ERISA also has been recognized by Michigan courts. *See, e.g., McMartin, supra.* In fact, Petitioner, Hughes, when represented by other counsel, originally brought this action in a Michigan state

court seeking relief under several state law theories, including fraud and misrepresentation. On General Motors' motion, that complaint was dismissed for lack of subject matter jurisdiction due to the claims being pre-empted by ERISA. *Hughes v. General Motors Corporation,* Case No. 81-27437-CK (Ingham County, Michigan, Circuit Court, June 4, 1984). It was after that dismissal that Petitioners' current counsel was retained and this case was filed in federal court.

The lower federal courts' decisions have left Petitioners without a forum in which to seek relief for the wrongs they allege were committed by Respondents. The cases clearly indicate that Petitioners' state law claims are preempted by ERISA yet the lower courts have indicated that Petitioners cannot bring this action in federal court either. The practical effect of the lower courts' decisions is that ERISA has been used to extinguish all remedies available to Petitioners and to deprive Petitioners of any opportunity to seek redress for the wrongs they believe they suffered, notwithstanding the broad remedial effect to be given to ERISA.

Shortly after the entry of the Sixth Circuit's August 30, 1988 order denying Petitioners' petition for rehearing and suggestion for rehearing en banc, the decision in *Berlin v. Michigan Bell Telephone Co.*, 858 F.2d 1154 (6th Cir. 1988), was issued. *Berlin* held that an employer has a fiduciary duty not to make misrepresentations to potential participants regarding the offering of benefits when serious consideration is being given to making the offering. In the opinion, 858 F.2d at 1163 n.6, the Sixth Circuit attempted to distinguish between Berlin and the instant case by stating that the plan involved here was not in

effect at the time Petitioners retired. However, the *Berlin* court apparently was not aware that the special early retirement program involved in the instant case was an element of the Plan and had been for some time prior to 1980. (Deposition of David Schmidt at 34, 46; JA at 189-90). During the relevant time period it was offered at other divisions of General Motors as well as to fifty-eight and fifty-nine year old salaried employees at the Oldsmobile Division. *Hughes*, No. 87-1506, slip op. at 2 (App. A at App. 2 - App. 3). As was the case in *Berlin*, the benefit scheme out of which this lawsuit arose was implemented prior to 1980, was in effect and was used throughout the relevant time period.

There is, therefore, no meaningful factual distinction between *Berlin* and the instant case. *Berlin* correctly applied the applicable standard of reviewing a motion for summary judgment and complied with the clear policy underlying ERISA. The decision in the instant case did not and, as a result, Petitioners are left without any remedies for the wrongs committed by Respondents.

Petitioners filed a Motion to Recall Mandate to Allow a Petition for Rehearing and Rehearing En Banc asking the Sixth Circuit to reconsider its decision in light of *Berlin* and its even more recent decision in *Kentucky Laborers District Council Health and Welfare Fund v. Hope*, 861 F.2d 1003 (6th Cir. 1988), discussed *infra*. The motion was denied, see Appendix C, making it necessary for Petitioners to seek relief in this Court.

4. The actions taken by Respondent constituted a constructive discharge and Petitioners have a claim under section 510 of ERISA, 29 U.S.C. § 1140

The district court, holding that Petitioners had no standing under ERISA, did not reach the issue of whether Petitioners had stated a claim under section 510 of ERISA, 29 U.S.C. § 1140. The Court of Appeals, however, held that the Petitioners did not have a section 510 claim because Petitioners showed no evidence of discrimination against them. Petitioners' claim, however, as was argued both to the district court and the Court of Appeals, was that the Respondents' actions constitute a constructive discharge, not that they were discriminated against.

Section 510 was enacted to prevent, among other things, employers from arbitrarily discharging employees whose pension rights were about to vest. *West v. Butler,* 621 F.2d 240, 245 (6th Cir. 1980), *citing* 119 Cong. Rec. 30044, *reprinted* in ERISA Legislative History at 1641 (Explanation by Senator Javits). Among the types of conduct proscribed by section 510 were actions taken by the employer which are "so unpleasant as to amount to a constructive discharge, a term used by the National Labor Relations Board." *West v. Butler,* 621 F.2d at 245, *quoting,* 119 Cong. Rec. 30374, *reprinted in* ERISA Legislative History at 1774-75 (Comments by Senator Hartke).

Petitioners submit that misrepresentations by an employer which lead an employee to retire before he becomes eligible for benefits should be considered constructive discharge as well. An employer should not be allowed to trick an employee into retiring and escape

liability. ERISA should not be construed so narrowly as to allow this to occur.

5. If no remedy exists under the terms of ERISA, a federal common law remedy should be fashioned to protect Petitioners' interests

If ERISA is to be construed narrowly so as to exclude Petitioners' claims from its coverage, Petitioners should not be precluded from litigating their claims. A federal common law remedy should be fashioned.

This Court has indicated that the broad preemptive scope of ERISA displaces all state law actions relating to pension plan regulation. *Pilot Life*, 481 U.S. at 54-55; 107 S. Ct. at 1556-57. However, the Court also has indicated that Congress intended a body of federal common law to be developed. *Pilot Life*, 481 U.S. at 56; 107 S. Ct. at 1557-58.

As this Court indicated in *Pilot Life*, 481 U.S. at 56; 107 S. Ct. at 1557, Congress intended ERISA's preemptive effect to be analogous to the preemptive effect of section 301 of the Labor Management Relations Act, 29 U.S.C. § 185. In *Textile Workers Union America v. Lincoln Mills of Alabama*, 353 U.S. 448, 456-57; 77 S. Ct. 912, 918 (1957), this Court discussed the relationship between state law and federal labor law under the broad preemptive scope of section 301:

> The question then is, what is the substantive law to be applied in suits under § 301(a)? We conclude that the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws. . . . The Labor Management Relations Act expressly furnishes some

> substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem. . . . Federal interpretation of the federal law will govern, not state law. . . . But state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy. . . . Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights.

The same rationale should be applied in the ERISA context. A federal common law remedy should be fashioned to protect Petitioners' rights. *See, e.g., Carl Colteryhan Dairy Inc.*, 874 F.2d at 122.

Surprisingly, the Sixth Circuit has recognized that a federal common law remedy should be fashioned to protect those whose state law remedies were lost due to the broad preemptive scope of ERISA. In *Whitworth Bros. Storage Co. v. Central States, Southeast and Southwest Areas Pension Fund*, 794 F.2d 221 (6th Cir. 1986), the Sixth Circuit held that an employer had a federal common law remedy to recover payments made to a pension fund by mistake. This holding was reached after the court concluded that an employer did not have standing under section 502 of ERISA, 29 U.S.C. § 1132, and that employers have no implied right of action under ERISA. The Sixth Circuit failed to consider the existence of a federal common law remedy in this case, however.

The Sixth Circuit recently reaffirmed its decision in *Whitworth*. In *Kentucky Laborers District Counsel Health and Welfare Fund v. Hope*, 861 F.2d 1003 (6th Cir. 1988), the Sixth Circuit reversed the trial court's holding that it did not have subject matter jurisdiction under section 502 of ERISA, 29 U.S.C. § 1132, over a plan's action seeking to recover benefits paid as a result of a participant's fraud. The Sixth Circuit in *Hope* concluded that the broad preemptive scope of ERISA extinguished any state law remedies but that a federal common law remedy should be fashioned to provide relief. *Hope*, 861 F.2d at 1005-1006.

As indicated above, Petitioners also asked the Sixth Circuit to recall the mandate to reconsider its decision in the instant case in light of *Whitworth* and *Hope*. The Sixth Circuit refused.

Consistent with this Court's clear holdings and the Sixth Circuit's holding in *Whitworth* and *Hope*, and contrary to its holding in the instant case, if the express terms of ERISA and the Plan itself do not provide a remedy, a federal common-law remedy should be fashioned to effectuate ERISA's policy of protecting participants in employee benefit plans. It is unconscionable to deny relief to Petitioners on the basis that ERISA preempts otherwise valid state law claims. ERISA, enacted to protect participants and beneficiaries, should not be used as a shield to protect employers from liability for their wrongful conduct.

CONCLUSION

Because this case is before this Court seeking review of the trial court's granting of summary judgment in favor of Respondents, when the record developed during discovery is reviewed certain inferences must be drawn in Petitioners' favor. Petitioners submit that it is appropriate to infer that Respondents knew prior to May 1, 1980, that special early retirement benefits would be offered at least to the 58 and 59 year-old salaried employees, that the knowledge of this offering was material to Petitioners and that Respondents intended to withhold this information from Petitioners. It also is clear that, but for the enactment of ERISA, Petitioners would have valid state law claims for fraud, misrepresentation and common-law breach of fiduciary duty. In light of this, the Sixth Circuit's decision in the instant case is inimical to the legislative intent behind, and the spirit of, ERISA.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

Dated: January 27, 1989

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APPENDIX

APPENDIX A

NOT RECOMMENDED FOR PUBLICATION

No. 87-1506

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JACK R. HUGHES and MERLE A. PETTIT,

Plaintiffs-Appellants,

v.

GENERAL MOTORS CORPORATION, A DELAWARE CORPORATION; THE GENERAL MOTORS RETIREMENT PROGRAM FOR SALARIED EMPLOYEES, AN EMPLOYEE BENEFIT PLAN; THE FINANCE COMMITTEE OF GENERAL MOTORS CORPORATION; JAMES L. LEWANDOWSKI, JOINTLY AND SEVERALLY,

Defendants-Appellees,

EDMOND W. LITTLEFIELD; ET AL.,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN.

[FILED JULY 14, 1988]

Decided and Filed _____

BEFORE: NELSON and NORRIS, Circuit Judges; and SPIEGEL, District Judge.*

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* The Honorable S. Arthur Spiegel, United States District Judge for the Southern District of Ohio, sitting by designation.

ALAN E. NORRIS, Circuit Judge. Plaintiffs-appellents, Jack R. Hughes and Merle A. Pettit, appeal from an order of summary judgment dismissing, for lack of standing, their complaint against defendants-appellees, General Motors Corporation ("GM"), the General Motors Retirement Program for Salaried Employees ("GM Plan"), the Finance Committee of General Motors, and certain GM officers. Hughes and Pettit are retired employees of GM's Oldsmobile division, and their complaint asserted claims based upon the Employee Retirement Income Security Act of 1974 ("ERISA").

BACKGROUND

On May 1, 1980, Hughes and Pettit retired and began receiving retirement benefits from the GM Plan, an ERISA employee pension benefit plan.

Special early retirement benefits had been offered by other divisions of GM and it was rumored that Oldsmobile would follow suit. In February 1980, Pettit contacted Robert Shong, coordinator of employee benefits, and was advised by him that Oldsmobile was not contemplating adopting a program to increase early retirement benefits. Relying upon this advice, Pettit gave written notice that he would retire on May 1, 1980. Hughes also gave written notice of his intent to retire on May 1, 1980.

Both Hughes and Pettit continued to inquire about possible adoption by Oldsmobile of special early retirement benefits, and indicated their willingness to work any additional time necessary to qualify. Pettit's final inquiry was made on April 15, and Hughes last inquired on April 30, the day before his retirement.

On April 22, Oldsmobile's general manager authorized special early retirement benefits for employees who would attain the age of fifty-eight or fifty-nine by August 1, 1980. Even though the decision would not have applied to Hughes and Pettit, both fifty-six years of age, they argue that knowledge of its existence would have alerted them to postpone retirement and await further developments.

In May 1980, in an effort to reduce its salaried workforce, Oldsmobile offered special early retirement benefits to employees who would attain the age of fifty-five, fifty-six, or fifty-seven by August 1, 1980. The special benefits would have provided higher monthly payments to both Hughes and Pettit, and would have eliminated the requirement in their present benefits plan that retirement benefits be reduced by outside income. They contend that Shong and other personnel department employees knew, no later than April 28, 1980, that Oldsmobile had decided to extend these special benefits to persons in their age bracket.

Pettit requested that he be allowed the additional benefits under the special early retirement offer, maintaining that he had moved up his originally scheduled retirement date of May 1, 1980 because of Shong's advice. James Lewandowski, Oldsmobile's personnel director, wrote to Hughes and Pettit, stating that the company made its decision to offer special early retirement to their age group after May 1, 1980 and, since Hughes and Pettit were no longer active employees, neither was entitled to those benefits.

Plaintiffs' second amended complaint detailed three claims based upon provisions of ERISA: that, by failing to disclose information, defendants deprived them of rights and benefits to which they would have been entitled under the special early retirement program (29 U.S.C. § 1132(a)(1)(B)); that defendants violated fiduciary duties by failing to disclose information and by intentionally or negligently misrepresenting GM's intention to implement special early retirement programs (29 U.S.C. § 1104); and that defendants interfered with their eligibility to receive early retirement benefits (29 U.S.C. § 1140).

Defendants filed motions for summary judgment contending that Hughes and Pettit had failed to exhaust their administrative remedies under the GM Plan, that they lacked standing to bring suit under ERISA, and that, even if they did have standing, Oldsmobile had no duty to disclose reitrement plans that were only contemplated at the time they retired.

On March 24, 1987, the district court granted the motions for summary judgment, solely upon the ground that Hughes and Pettit lacked standing because they were not "participants," as defined in 29 U.S.C. § 1002(7) and, therefore, were not authorized to pursue their claims.

DISCUSSION

The United States district courts are not courts of general jurisdiction, of course, and before a federal court can decide a claim for relief, the court must be satisfied that Congress has empowered it to do so. While it is conceivable that plaintiffs in the case at bar may have meritorious claims arising under state law, in order to

pursue those claims in federal court, they must demonstrate that they and their claims come within the terms of the statutory provisions they rely upon in their complaint as giving rise to federal court jurisdiction.

Standing

ERISA authorizes a "participant" to commence a civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). A participant may also sue to enforce provisions of ERISA 29 U.S.C. § 1132(a)(3)(B)(ii). The Act defines a "participant" as:

> [A]ny employee or former employee of an employer, of any member of former member of an employee organization, *who is or may become eligible to receive a benefit of any type,* from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

29 U.S.C. § 1002(7) (emphasis added).

According to their complaint, Hughes and Pettit are former employees who are receiving benefits from the GM Plan. They claim they are entitled to additional benefits under an amendment to the plan, due to misconduct of defendants. Accordingly, plaintiffs appear to have alleged a status that fits precisely within the plain language of the statutes quoted above. The district court reasoned that, since the benefits sought were first made available as the result of an amendment adopted after plaintiffs retired, they could not be eligible for the benefits and therefore could not be "participants" authorized

to bring suit. It seems to us that the district court's reasoning requires treating each component benefit under a pension plan as a separate and distinct "employee benefit plan" for the purpose of determining who is a "participant" having standing. Such a strained reading of the statute is not warranted. In addition, the practical effect of the district court's holding was to require that plaintiffs prevail on the merits–demonstrate that they are entitled to the additional benefits–as a prerequisite to qualifying for the standing necessary to adjudicate the merits of their claims.

In determining who is a "participant," for purposes of standing, the definition found in 29 U.S.C. § 1002(7) must be read in the context of traditional concepts of standing, not in the context of adjudicating the ultimate issue of the merits of plaintiffs' claim that they are not receiving the full extent of the benefits to which they are entitled from the employee benefit plan to which is paying them retirement benefits. The doctrine of standing is concerned with whether a person is the proper party to request adjudication of a particular issue [*Flast v. Cohen*, 392 U.S. 83, 101-02 (1968)], whether a person has alleged such a personal stake in the outcome of a justiciable controversy that he should be entitled to obtain its judicial resolution. *See Baker v. Carr*, 369 U.S. 186, 204 (1962). Standing focuses on a person's effort to get his complaint before a court and not on the issue he wishes to have adjudicated. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 484 (1982).

The question before us, then, is whether Congress intended that persons in plaintiffs' positions have the

right to seek judicial relief. It appears to us that the statute manifests an intention that the right to bring cliams concerning pension benefits should be limited to those who are, or claim they are, entitled to receive a benefit from a pension plan.

Here, plaintiffs allege that they are former employees who are receiving benefits from their employee benefit plan and seek to recover additional benefits to which they claim they are entitled, but are being denied them as the result of defendants' conduct. Accordingly, they have alleged, under both ERISA and traditional concepts of standing, a sufficient personal stake in the outcome of a justiciable controversy to obtain a judicial resolution of their dispute with defendants. They are within the zone of interests ERISA was intended to protect. *See* 13 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3531.7 (1984).

The district court relied upon *Stanton v. Gulf Oil Corp.*, 792 F.2d 432, 434-35 (4th Cir. 1986); *Joseph v. New Orleans Elec. Pension & Retirement Plan*, 754 F.2d 628, 630 (5th Cir.), *cert. denied*, 474 U.S. 1006 (1985); *Jackson v. Sears, Roebuck & Co.*, 648 F.2d 225, 227-29 (5th Cir 1981); and *Nugent v. Jesuit High School*, 625 F.2d 1285, 1286-87 (5th Cir. 1980). The cases from the Court of Appeals from the Fifth Circuit are easily distinguished. In *Jackson*, the employer historically had maintained two separate and distinct retirement plans; at the time of her termination, Jackson was among the class of employees entitled to participate in one plan but not in the other – she claimed she would have been entitled to participate in the other plan had she been permitted to stay for another one and one-half months. In *Joseph*, the plaintiffs were employees

who had elected to recieve a lump-sum retirement benefit in lieu of a continuing monthly benefit, and sought the benefit of a later adopted amendment to the plan which changed the way in which benefits were calculated. Actually, it may be argued that *Nugent* supports our view since there the court of appeals recognized that an employee who is terminated after the vesting of rights in a pension plan is a participant for purposes of standing.

However, the *Stanton* case does appear to support the district court's holding, at least to the extent of its denial of standing. There, the court of appeals in essence required an early retiree, who was seeking additional benefits from his retirement plan under circumstances remarkably similar to those before us, to prove his entitlement to the benefits as a condition of standing; it appears to have treated the modification of benefits which plaintiff was seeking as though it were a separate and distinct plan from the one in which plaintiff was participating as a retiree.

To require a plaintiff to prove the issue he seeks to have adjudicated, as a condition of entitlement to the opportunity to have it adjudicated, would turn the traditional concept of standing on its head. Accordingly, to the extent that the cases cited above require a former employee, who is receiving benefits from an employee benefit plan, to establish his entitlement to additional benefits from the plan as a condition of standing to adjudicate his entitlement to the additional benefits, we decline to follow those cases.

We note that our reasoning is supported by an opinion from the Court of Appeals for the Third Circuit in

Bruch v. Firestone Tire & Rubber Co., 828 F.2d 134, 152-53 (3d Cir. 1987), *cert. granted*, 108 S.Ct. 1288 (1988). In *Bruch*, the court reasoned that 29 U.S.C. § 1132(a) should be construed as if it read "a civil action may be brought by *someone who claims to be* a participant," and that a person does not lack "standing to claim an entitlement to benefits just because it turns out that he is in fact not entitled to those benefits. When a court holds that a claimant is not entitled to benefits, the claimant loses on the merits and judgment is entered against him." *Bruch*, 828 F.2d at 152.

Subject Matter Jurisdiction

However, our having determined that plaintiffs were persons authorized by Congress to bring ERISA claims, does not conclude the matter since the federal courts will not have subject matter jurisdiction unless plaintiffs have alleged claims which Congress, in ERISA, authorized the federal courts to adjudicate. Because we conclude that plaintiffs have not alleged ERISA claims, we affirm the judgment of the district court.

I.

The complaint informs us that the court's subject matter jurisdiction rests upon 29 U.S.C. § 1132(e)(1) and 28 U.S.C. § 1331. The former tells us that district courts have jurisdiction of actions brought under 29 U.S.C. § 1132(a)(1)(B). The jurisdictional inquiry starts, therefore, with that section: "A civil action may be brought . . . by a *participant or beneficiary* . . . to recover benefits due to him *under the terms of his plan*, to enforce his rights

under the terms of the plan, or to clarify his rights to future benefits *under the terms of plan.*" 29 U.S.C. § 1132(a)(1) (B) (emphasis added). Unless a plaintiff is "a participant or beneficiary" seeking to recover benefits or enforce or clarify his rights "under the terms of the plan," he may not bring an action under 29 U.S.C. § 1132(a)(1)(B).

Although neither of the plaintiffs claims to be an employee benfit plan "beneficiary" within the statutory definition of that term, we have already determined that each is a "participant." But it is undisputed that each of the plaintiffs is already receiving all the benefits due him "under the terms of his plan." The plaintiffs affirmatively allege that they do *not* qualify for the higher retirement benefits that became available to the plan participants who were still employed by the Oldsmobile Division of General Motors Corporation at a certain date after the plaintiffs retired. The whole point of the lawsuit is that the defendants, as the complaint avers, "caused [the plaintiffs] to be damaged by *not* being able to qualify for higher retirement benefits under the special early retirement program. . . . " (Emphasis added).

Just as it is evident that no special early retirement benefits are "due to" plaintiffs "under the terms of the plan," it is evident that the plaintiffs have no "rights" to present or future benefits under the terms of the plan." The plaintiffs allege, rather, that they *would have been* entitled to special early retirement benefits under the terms of the plan *but for* the fact that the defendants maliciously, falsely, or recklessly led the plaintiffs to believe that the terms of the plan would not be changed, after the date of their proposed retirements, to make special retirement benefits available to participants who

might still be on the payroll after that date. The words of 29 U.S.C. § 1132, as we read them, do not give the district court jurisdiction to decide claims of this type; the claims cannot fairly be said to be claims by a participant seeking to recover benefits or enforce or clarify rights "under the terms of the plan."

In this context, the result, if not the rationale, of the opinion in *Stanton v. Gulf Oil Corp.*, does not appear to be inconsistent with the outcome of this appeal. By the same token, it appears that the plaintiffs in *Bruch* were assumed to have colorable claims to benefits "under the terms of the plan," whereas the plaintiffs in the case at bar, like their *Stanton* counterpart, assert no such claims.

Plaintiffs would have been entitled to come into federal court had Congress seen fit to authorize suits not only by plan participants who are or may become eligible to receive a benefit "under the terms of the plan," but also by participants who would have become eligible but for a retirement induced by the withholding of information on contemplated changes in the plan's terms. The reason Congress did not include such language could well be that Congress simply did not happen to consider the possibility that it might have been appropriate. But whatever the reason, Congress said what it said – no more and no less. Congress did *not* say what the plaintiffs obviously would have wished it to say. Much as we might wish we had the power to amend congressional legislation where our sense of equity tells us that amendments would be desirable, the Constitution simply does not give us that power. *See Commissioner v. Asphalt Prods. Co.*, 107 S.Ct. 2275 (1987).

II.

It remains to be considered whether the district court had subject matter jurisdiction under 28 U.S.C. § 1331, which says that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

In this connection, we must determine first whether the plaintiffs have a colorable claim for damages resulting from a breach of the fiduciary's statutory duty to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan," which duty must be carried out "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(A)-(B). Absent any suggestion that the terms of the GM plan obligated the plan fiduciary to tell participants, prior to their retirement, of any changes in the terms of the plan that were under consideration but had not yet been adopted, we see no basis for a colorable claim that the fiduciary failed properly to discharge its statutory duties as a prudent man would have done. If the fiduciary had a duty not to deceive plaintiffs as to what was being contemplated in the way of future amendments to the terms of the plan, the duty arose under the common law of the State of Michigan; it did not arise under the terms of the plan itself, or under the terms of the federal statute prescribing the standards

under which the fiduciary's duties with respect to the plan were to be discharged.

Finally, we address the question whether plaintiffs have a colorable claim arising under 29 U.S.C. § 1140. The statute provides that "[i]t shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan. . . ." The operative verb here is "discriminate" – for there is not so much as a hint that plaintiffs were discharged, fined, suspended, expelled, or disciplined for the purpose of interfering with the attainment of any right to which plaintiffs might become entitled under the plan.

A colorable claim of "discrimination" in violation of 29 U.S.C. § 1140 was found to be present in *Saporito v. Combustion Eng'g, Inc.*, 843 F.2d 666, 672 (3d Cir. 1988), the plaintiffs in that case having alleged that the defendants not only failed to inform them of the development of a more generous retirement plan than that in which the plaintiffs were participants, but also "coerced the [plaintiffs] into retiring while providing information [on the development of the more generous plan] to some other employees. . . ." The *Saporito* plaintiffs contended, in the words of the court, that "but for the selective divulgence of information, they would have been members of [the more generous plan]. . . ." *Id.* The court went on to point out that "[t]his is *not* an instance where plaintiffs simply alleged that the employer did not inform the employees of a plan in development. *Instead, appellants here argue that [the defendant] induced appellants to retire* under the [less generous plan], *while secretly informing some individuals of*

the more lucrative [plan]." *Id.* (emphasis added) (footnote omitted).

The sort of discrimination alleged in *Saporito* has not been alleged here. Plaintiffs in this case do allege that GM made special early retirement benefits available before May 1, 1980, to participants employed by the Pontiac, Buick, and Delco-Remy divisions of the company, but there is no allegation that any Oldsmobile Division employee was told, prior to May 1, that special early retirement benefits had been made available to participants in other divisions, and there is no allegation that any employee of the Oldsmobile Division was told that the company planned to make such benefits available to Oldsmobile Division employees in the future. Plaintiffs have simply not alleged any discrimination in favor of other employees in their division.

The point of the foregoing discussion is that, although plaintiffs, as former employees who are receiving benefits under the GM plan are undoubtedly "participants" in the plan, that fact alone does not give the federal courts jurisdiction to adjudicate claims that arise neither under the terms of the plan nor under the terms of the statute. If a plan participant had purchased an Oldsmobile car that proved to have a defective transmission, for example, the participant might have had a claim against GM for breach of warranty – but such a claim could not be adjudicated in the federal courts absent a statute giving the federal courts jurisdiction to entertain warranty claims. So it is with the claims sought to be advanced here; they do not arise under the terms of the plan, they do not arise under the terms of the statute, and thus they are not justiciable in a federal court.

The judgment of the district court is **affirmed.**

ISSUED AS MANDATE: September 14, 1988

COSTS: NONE

A TRUE COPY

Attest:
LEONARD GREEN, Clerk
By /s/ Tom Bennignus
Deputy Clerk

APPENDIX B

No. 87-1506

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JACK R. HUGHES and MERLE A. PETTIT, Plaintiffs-Appellants,	)	
	)	ORDER
v.	)	
GENERAL MOTORS CORPORATION, ETC., ET AL., Defendants-Appellees,	)	[Filed August 30, 1988]
EDMOND W. LITTLEFIELD, ET AL., Defendants	)	

BEFORE: NELSON and NORRIS, Circuit Judges, and SPIEGEL*, United States District Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the

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*Hon. S. Arthur Spiegel sitting by designation from the Southern District of Ohio

petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

APPENDIX C

NO. 87-1506

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JACK R. HUGHES AND MERLE A. PETTIT, Plaintiffs-Appellants	ORDER
vs.	
GENERAL MOTORS CORPORATION, ET AL., Defendants-Appellees	[Filed December 29, 1988]
EDMOND W. LITTLEFIELD, ET AL., Defendants	

Upon consideration of the motion of the appellants to recall the mandate to allow filing a petition for rehearing en banc,

It is **ORDERED** that the motion be, and it hereby is, **denied.**

ENTERED BY ORDER OF THE COURT
Leonard Green, Clerk

/s/ Leonard Green/jy

APPENDIX D

UNITED STATES OF AMERICA
DISTRICT COURT FOR THE WESTERN
DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JACK R. HUGHES and
MERLE A. PETTIT,

Plaintiffs,

-vs-

GENERAL MOTORS CORPORATION, a Delaware corporation; THE GENERAL MOTORS RETIREMENT PROGRAM FOR SALARIED EMPLOYEES, an employee benefit plan; THE FINANCE COMMITTEE OF GENERAL MOTORS CORPORATION; JAMES L. LEWANDOSKI, [sic], Jointly and Severally,

Defendants.

Case No. G84-1169 CA5

OPINION GRANTING DEFENDANTS' SECOND MOTION FOR SUMMARY JUDGMENT

[filed March 24, 1987]

This matter is before the court on two summary judgment motions by defendants General Motors Corporation ("GMC") et al. In their first summary judgment motion, filed on October 24, 1985 and amended on April 16, 1986, defendants argue that the pending action, based on the Employment Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, is barred by

plaintiffs' failure to exhaust the internal appeal procedures provided by the pension plan under which plaintiffs are claiming a wrongful denial of benefits. In their second summary judgment motion, filed December 8, 1986, defendants argue first, that the plaintiffs lacked standing to bring a suit under ERISA and second, that even if plaintiffs have standing to bring suit, GMC had no duty to disclose retirement plans that were only contemplated at the time of plaintiffs' retirements.

For the reasons discussed below I am convinced that defendants' second motion for summary judgment should be granted. Although I carefully considered all of the arguments made in both motions, my opinion is limited to the standing issue as it is dispositive of the entire case.

I. Factual Background

Plaintiffs Jack Hughes and Merle Pettit, long-time salaried employees of the Oldsmobile Division of General Motors Corporation ("Oldsmobile"), retired on May 1, 1980 at the age of 56. On several occasions between January and May of 1980, they independently spoke with Robert Shong, the Oldsmobile personnel department employee with primary responsibility for discussing retirement benefits with salaried employees. Both plaintiffs sought information regarding the retirement benefits available to them and in particular sought confirmation of the rumors that special early retirement benefits might be made available to employees of the Oldsmobile Division. Mr. Pettit's last inquiry before retiring was sometime prior to April 21, 1980. Mr. Hughes made inquiries as late as April 30, the day before his retirement.

On April 22, 1980, Robert Cook, the General Manager of Oldsmobile, authorized extension of special retirement benefits to Oldsmobile salaried employees who would attain the age of 58 or 59 by August 1, 1980. Neither plaintiff Hughes nor Pettit was eligible for benefits under this plan. Sometime in May 1980 the plan's coverage was extended to employees who would attain the age of 55, 56, or 57 by August 1, 1980, an age range within which plaintiffs Hughes and Pettit would have fallen had they continued employment with GMC. Although the exact date of this extension is in dispute, all parties agree that no salaried employee that would attain the age of 55, 56, or 57 by August 1, 1980 was offered special early retirement benefits on or before May 1, 1980.

Following the extension of benefits to those who would attain 55, 56, or 57 by August 1, Pettit, who was by then officially retired, wrote a letter to the Oldsmobile Division requesting that his retirement status be changed to allow him to obtain the benefits under the special early retirement plan. Subsequently both plaintiffs received letters from James Lewandoski, Personnel Director of the Oldsmobile Division. The letters, dated May 30, 1980 denied reclassification. Neither Hughes nor Pettit pursued any internal administrative appeal of the decision.

II. Plaintiffs' Claims

In Count One, plaintiff Hughes claims that the defendants breached a fiduciary duty owed to plaintiff Hughes under Section 404 of ERISA, 29 U.S.C. § 1104, by failing to disclose to Hughes that an early retirement benefit plan was being contemplated. According to Hughes, the defendants had a duty to inform Hughes that a special

early retirement plan was being "contemplated" and the failure to so inform him breached a duty owed to Hughes under ERISA. Count Two makes a similar allegation with respect to Pettit. Pettit's claim, however, differs from Hughes' in that Pettit does not claim that he had any discussions with representatives of the defendants between April 15 and his retirement. Pettit claims that defendants had a duty to seek out Pettit and inform him that a special early retirement plan was being contemplated. In Count Three, plaintiffs Hughes and Pettit allege that the breaches of duty alleged in Counts One and Two were willful, intentional misstatements in violation of Section 510 of ERISA, 29 U.S.C. § 1140. Finally in Count Four, plaintiffs allege that they have been wrongfully denied benefits which they would have received had they participated ~~in~~ the special early retirement plan.

In this and other circuits, judicial review under ERISA of a decision by retirement plan administrators denying pension benefits is limited to a determination of whether that denial was arbitrary or capricious, or in bad faith. *See, e.g., Cook v. Pension Plan for Salaried Employees,* 801 F.2d 865 (6th Cir. 1986); *Rhoton v. Central States, Southeast and Southwest Areas Pension Fund,* 717 F.2d 988, 989 (6th Cir. 1983); *Van Gunten v. Central States, Southeast and Southwest Areas of Pension Fund,* 672 F.2d 586 (6th Cir. 1982). Before a court can apply this standard, however, it must determine whether a plaintiff has standing to raise an ERISA claim.

When a standing argument is raised by a defendant in a summary judgment motion, as in the case at hand, it is incumbent upon the defendant to show conclusively that there is no genuine issue of material fact regarding

plaintiff's eligibility to bring suit. *See* Fed. R.Civ.P. 56(a); *Smith v. Hudson*, 600 F.2d 60 (6th Cir. 1979). In determining whether such issues of material fact exist, the court must look at the inferences that can be drawn from the underlying facts contained in the affidavits, attached exhibits and depositions in the light most favorable to the plaintiff. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

Looking to the underlying facts established in the affidavits and depositions submitted by the parties to this case as well as to the facts to which the parties stipulated in the pretrial order filed on February 18, 1987, and viewing all inferences that may be drawn therefrom in the light most favorable to the plaintiffs, I find that there is no possible set of facts under which either plaintiff would have standing to bring this suit.

III. Discussion

Under Section 1132(a)(2) of ERISA, only a "participant," "beneficiary," "fiduciary," or the Secretary of Labor may bring a civil enforcement action in federal court. Thus, in order for plaintiffs Hughes and Pettit to bring this ERISA action against GMC for breach of fiduciary duty, they must be found to have been participants in the plan under which they were denied benefits.

ERISA defines "participant" as "any employee or former employee of an employer . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer . . . or whose beneficiaries may be eligible to receive any such benefit." 29 U.S.C. § 1002(7). Over the

last half dozen years a number of courts have considered the definition of participant when former employees seek benefits first made available after their retirement. *See, e.g., Stanton v. Gulf Oil Corporation,* 792 F.2d 432 (4th Cir. 1986); *Joseph v. New Orleans Elec. Corp.,* 792 F.2d 628 (5th Cir. 1985), *reh. denied,* 761 F.2d 695, *cert. denied,* U.S. , 106 S.Ct. 526 (1985); *Jackson v. Sears Roebuck and Co.,* 648 F.2d 225 (5th Cir. 1985); *Nugent v. Jesuit High School,* 625 F.2d 1285 (5th Cir. 1980); *Ogden v. Michigan Bell Telephone Co.,* Civil Action No.83-CV-482-DT (E.D. Mich. Jan. 27, 1987). *Walker v. Mountain States Telephone and Telegraph Co.,* 7 E.B.C. 2623 (D.C. 1986).

In all but *Ogden,* the courts found that the plaintiffs were not participants under ERISA and thus did not have standing to bring suit. While at least one of these cases rests in part on the fact that the plaintiffs took their pension benefits in the form of a single lump sum payment and thus were no longer eligible to receive benefits, *see e.g. Joseph, supra,* the underlying premise of each decision is that no former employee can be termed a participant with respect to rights which did not vest before he or she terminated employment.

The facts of *Stanton,* the most recent circuit court opinion addressing the definition of participant, are particularly analogous to the instant case. Before plaintiff Stanton retired, he met with a personnel employee to discuss his benefits and determine whether any changes in benefits were contemplated by the company. Upon inquiry, the plaintiff was told that no special retirement plans were made under consideration. In fact, three weeks before Stanton retired, his employer had approved

an early retirement plan designed to provide special benefits to upper level management. That plan, like the initial plan in the instant case, did not apply to plaintiff Stanton. It was available only to employees in a higher salary range. However, several months later it was modified and two weeks after modification benefits were extended to a category of employees making the same salary that Stanton had before his retirement.

The district court dismissed the case on a summary judgment motion on the grounds that Stanton could not be a participant in the program and thus had no standing to bring suit under ERISA. The Fourth Circuit upheld the district court's ruling finding that the plaintiff could not be a participant in a program which, while adopted before the plaintiff retired, had not by that time been extended to employees within his salary bracket. The plaintiff, like plaintiffs Hughes and Pettit, was not an employee who, at the time of his retirement, "may [have] become eligible to receive a benefit of any type from the benefit plan." Like earlier courts faced with determining participant status, the *Stanton* Court based its decision on the rule that former employees have no rights under ERISA to benefits that are not vested or accrued before termination of employment. *Stanton, supra* at 435 (citations omitted). The crucial date for the court's determination was not when any special early retirement program was created, nor when the decision was made to grant benefits to individuals within Stanton's salary bracket, but rather the date on which such benefits were actually extended to those of plaintiff's status. *Id. at* 434.

This same rule, that ERISA protects only vested rights, has been applied in slightly different contexts by

district courts in the Sixth Circuit. *See, Coleman v. General Electric Co.*, 643 F.Supp. 1229, 1238 (E.D. Tenn. 1986); *United Electric Radio and Machine Workers v. Amcast Industrial Corp.*, 634 F.Supp. 1135, 1141 (S.D. Ohio 1986). In *Coleman*, the court held that if benefits were contingent, in other words not yet vested or accrued, no violation of the fiduicary duty imposed be ERISA could be found regardless of whether a misrepresentation regarding those benefits had been made. *Coleman, supra* at 1238. Other circuits have also applied the rule to employee benefits plans. Thus, in *United Independent Flight Officers, Inc. v. United Airlines, Inc.*, 756 F.2d 1274, 1280 (7th Cir. 1985), the court held that while ERISA mandates fiduciary duties with respect to employee benefit plans, such duties do not begin until the terms at issue are incorporated into a plan. In *Fine v. Semet*, 699 F.2d 1091, 1094 (1983), the Eleventh Circuit held that it is not a violation of ERISA to fail to furnish information regarding amendments to a plan before those amendments were extended to an employee.

Plaintiffs and defendants in this case agree that as of the last date Hughes and Pettit inquired as to the availability of early retirement benefits, no extension of benefits had been made to employees within plaintiffs' age bracket. (Order on Pretrial Conference, Feb. 18, 1987 at 3.) On May 1, when plaintiffs retired, special benefits for 55, 56, and 57 year-olds could not even be termed contingent but unvested or unaccrued. As of that date, they simply did not exist. Viewing all inferences that can be drawn from this and the other facts established in this case in the light most favorable to the plaintiffs, I am convinced that Hughes and Pettit do not have standing under

ERISA to bring this suit. It is true that several factual issues remain in dispute. The pleadings do not, for instance, establish when precisely Shong learned about the retirement plan for 58 and 59 year-olds or when and at what management level extension of benefits to 55, 56, and 57 year-olds was first contemplated. However, none of these issues is material to a determination of plaintiffs' standing.

Plaintiffs attempt to circumvent this point by arguing that it was information regarding the special benefits for 58 and 59 year-olds, rather than the existence of a program for 55, 56, and 57 year-olds that was "material to plaintiffs' decisions to retire." (Plaintiffs' Response, Jan. 30, 1987, at 11). In a purely logical sense plaintiffs may be correct. Had they known that Oldsmobile was contemplating the extension of benefits to 58 and 59 year-olds they might not have retired in the hope that benefits would also be extended to 57 year-olds. However, whether or not that information was logically material to their decision, it is not legally material. Only an employee or a former employee who is a "participant" as defined by ERISA will have standing to pursue an ERISA claim. Unless a plaintiff has such standing, a defendant-employer's actions will not be subject to scrutiny under ERISA's fiduciary duty standard of care. Plaintiffs' argument would turn ERISA inside out requiring a court to apply the ERISA fiduciary standard to any action that motivated a plaintiff-employee to do something, such as retire, but for which he or she would have achieved standing. If this rule were followed, the determination of standing would become an exercise in speculation.

Plaintiffs cite *Ogden v. Michigan Bell Telephone Co.*, Civil Action No. 83-CV-0482-DT (E.D. Mich. Jan. 27, 1987) to support their contention that they have standing under ERISA to pursue their claims of breach of fiduciary duty. Factually, that case closely resembles the case at hand. The plaintiffs there, like the plaintiffs here, sought recovery of benefits on the grounds that the defendants allegedly misrepresented the availability of special benefits for early retirement. Citing the ERISA definition that a participant is "any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan," the *Ogden* Court reasoned that the plaintiffs did have standing "for if the plaintiffs are successful, they would recover a plan benefit." *Ogden, supra* at 4.

This reasoning is contrary to common sense as well as other cases addressing the definition of participant under ERISA. *See, e.g., Stanton, supra; Joseph, supra; Jackson, supra; Nugent, supra;* and *Walker, supra.* Carried to its logical conclusion this reasoning would require one of two unacceptable outcomes in every ERISA case similar to this one. It would either allow standing to any ERISA plaintiff because she or he might win their claim, or it would require that a court first determine whether a plaintiff would win and if she or he would, grant standing on that basis. It should be noted that the *Ogden* Court did not intend the latter as, after granting plaintiffs in that case standing, it determined that the defendants did not breach any fiduciary duty in misrepresenting the future availability of special early retirement benefits.

According to the court, the decision to extend such benefits was a "business decision" which plaintiffs had no right to know about under ERISA.

Plaintiffs' arguments do not sway me from my conclusion that defendants have demonstrated that there are no genuine issues of fact material to the determination of plaintiffs' standing. Viewing all of the inferences that can be drawn from the facts established in the light most favorable to the plaintiffs and applying the rules of ERISA standing to them, plaintiffs must be found to be without standing to pursue this suit. Defendants' second motion for summary judgment is granted with respect to all counts.

/s/ Douglas W. Hillman
Douglas W. Hillman
Chief Judge

Dated: Mar 24 1987.

UNITED STATES OF AMERICA
DISTRICT COURT FOR THE WESTERN
DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JACK R. HUGHES and
MERLE A. PETTIT,

Plaintiffs,

-vs-

GENERAL MOTORS CORPORATION, a Deleware corporation; THE GENERAL MOTORS RETIREMENT PROGRAM FOR SALARIED EMPLOYEES, an employee benefit plan; THE FINANCE COMMITTEE OF GENERAL MOTORS CORPORATION; JAMES L. LEWANDOSKI, [sic], Jointly and Severally,

Defendants.
_____/

Case No. G84-1169 CA5

ORDER GRANTING DEFENDANTS' SECOND MOTION FOR SUMMARY JUDGMENT

[Filed March 24, 1987]

In accordance with the opinion filed this date.

IT IS HEREBY ORDERED that defendants' second motion for summary judgment is granted with respect to all counts and the case is therefore dismissed.

/s/ Douglas W. Hillman
Douglas W. Hillman
Chief Judge

Dated: Mar 24 1987. Certified As A true Copy
C. Duke Hynek, Clerk
By /s/ S. McDonald
Deputy Clerk
U.S. District Court
Western Dist. of Michigan
Date Mar 24 1987

APPENDIX E

UNITED STATES OF AMERICA
DISTRICT COURT FOR THE WESTERN
DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JACK R. HUGHES and
MERLE A. PETTIT,
Plaintiffs,

-vs-

GENERAL MOTORS CORPORATION, a Delaware corporation, et al.,
Defendants.
_____/

Case No. G84-1169 CA

OPINION DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION

[Filed May 20, 1987]

This matter is before the court on a motion for reconsideration by plaintiffs Jack Hughes and Merle Pettit. On March 24, 1987, an order and an opinion were filed granting defendants' motion for summary judgment based on this court's finding that plaintiffs are not "participants" in defendants' early retirement incentive program and thus did not have standing to pursue their claims under 29 U.S.C. §§ 1104 or 1140. Plaintiffs do not contest the court's finding with respect to Section 1104. However, they argue that they are "participants" within the meaning of ERISA for the purpose of pursuing a claim under Section 1140. I disagree. After a careful rereading of the cases cited in my opinion and of the cases brought to my attention in the briefs submitted on this motion, I remain convinced that plaintiffs cannot be termed "participants" within the meaning of ERISA and

thus do not have standing to bring suit under either of the cited provisions of ERISA.

I would note, however, that while the result mandated by the order filed last month was correct, the opinion contains several inaccurate characterizations of the law that require clarification. At page seven I state that the underlying premise of a number of cited cases is that "no former employee can be termed a participant with respect to rights which did not vest before he or she terminated employment." Similarly at page eight, I state that in *Stanton v. Gulf Oil Corp.*, 792 F.2d 432 (4th Cir. 1986), the court based its decision on the rule that "former employees have no rights under ERISA to benefits that are not vested or accrued before termination of employment." These statements inaccurately describe the cited cases. In fact, they apply only to the stiuation where an employer contemplates elimination of a benefit plan, *see e.g., Phillips v. Amoco Oil Co.*, 799 F.2d 1464 (11th Cir. 1986); *United Independent Flight Officers v. United Airlines*, 756 F.2d 1274, 1280 (7th Cir. 1985), not to the situation where an employer allegedly attempts to force the termination of an employer in order to prevent the employee from securing a vested interest in the benefits of an existing program for which he or she is eligible.

The last sentence of the only paragraph on page eight contains a correct characterization of the rule in *Stanton* as well as *Jackson v. Sears Roebuck and Co.*, 648 F.2d 225 (5th Cir. 1981) and *Nugent v. Jesuit High School*, 625 F.2d 1285 (5th Cir, 1980). "The crucial date for the [determination of participant status is] not when any special early retirement program was created, nor when the decision

was made to grant benefits to individuals within Stanton's salary bracket, but rather the date on which such benefits were actually extended to those of plaintiff's status." At that point, an employee eligible for the benefits available through that program becomes a participant (whether or not his rights under the program have vested) and consequently, certain fiduciary duties on the part of the employer come into being. *See, Stanton, supra; Fine v. Semet*, 699 F.2d 1091, 1094 (11th Cir. 1983). However, before particular benefits are incorporated into a plan, an employer has no duty to furnish employees with information concerning those benefits. *Independent Flight Officers, supra.*

Under this standard, neither Hughes nor Pettit qualify as participants under ERISA. Plaintiffs and defendants agree that as of the last date that Hughes and Pettit inquired into the availability of an early retirement program, General Motors had not extended the benefits to employees in plaintiffs' age bracket. (Order on Pretrial Conference, Feb. 18, 1987 at 3.) As of the date of Plaintiffs' retirement, early retirement benefits were not available to 55, 56, or 57 year-olds. Plaintiffs were 56 at the time. Since Plaintiffs were not eligible for benefits, they cannot now be found to have been participants at the time of their retirement.

In their motion to reconsider, plaintiffs cite a number of Section 1140 cases which they argue support their contention that they were participants in an early retirement program though it was not extended to individuals like themselves until after they retired. They state that these cases were brought by former employees who, like Hughes and Pettit, were discharged prior to becoming

eligible for pension benefits. *See, e.g., Zipf v. American Telephone and Telegraph Co.*, 799 F.2d 889 (3d Cir. 1986); *Amaro v. Continental Can Co.*, 724 F.2d 747 (9th Cir. 1984); *Kross v. Western Electric Co.*, 701 F.2d 1238 (7th Cir 1983); *Ursic v. Bethlehem Mines*, 556 F. Supp. 571 (W.D. Pa. 1983), *aff'd in part, rev'd in part* and *remanded on other grounds*, 719 F.2d 670 (3d Cir. 1985).

I disagree with plaintiffs' characterization of these cases. More accurately, each was initiated by a plaintiff who was fired by his or her employer sometime prior to the time that his or her rights in an existing plan for which he or she was qualified would have vested. Thus, for instance, in *Zipf*, the court found plaintiff, who would have been eligible for disability benefits beginning on the eighth calendar day of absence from work and was terminated on her seventh day of absence, to be a participant and to have standing to bring suit under Section 1140. Similarly, in *Amaro*, the plaintiffs were former employees of the defendant who, although eligible for benefits under the company's pension plan, were fired before they had accrued the number of years of service necessary for their benefits to vest. These plaintiff-participants are identical to those who qualify as participants for the purpose of bringing suit under Section 1104. *See Stanton, supra; Jackson, supra;* and *Nugent, supra*. They are individuals who are eligible for, though not necessarily vested with, benefits that have been extended to individuals of a like class under an existing program. As discussed above, plaintiffs Hughes and Pettit do not fit into this category.

Finally, I would note that the Sixth Circuit in construing Section 1053(a) of Title 29, held that ERISA does not

give an employee any nonforfeitable right to early retirement benefits. *McBarron v. S&T Industries, Inc.*, 771 F.2d 94, 99 (1985). Although not dispositive of the question of who qualifies as a "participant" under ERISA, this case indirectly supports the finding here.

For the reasons stated herein, plaintiffs' motion for reconsideration is denied and the opinion filed March 24, 1987 is amended as described above.

/s/Douglas W. Hillman
Douglas W. Hillman
Chief Judge

Dated: May 20 1987

UNITED STATES OF AMERICA
DISTRICT COURT FOR THE WESTERN
DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JACK R. HUGHES and
MERLE A. PETTIT,

Plaintiffs,

-vs-

GENERAL MOTORS CORPORATION, a Delaware corporation, et al.,

Defendants.

_____/

Case No. G84-1169 CA

ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION

[Filed May 20, 1987]

In accordance with the opinion filed this date,

IT IS FURTHER ORDERED that plaintiff's motion for reconsideration is denied.

IT IS ORDERED that the opinion filed March 24, 1987 is amended as noted.

/s/ Douglas W. Hillman
Douglas W. Hillman
Chief Judge

Dated: May 20 1987

Certified As A True Copy
C. Duke Hynek, Clerk
By /s/ S. McDonald
Deputy Clerk
U.S. District Court
Western Dist. of Michigan

Date: May 20 1987

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(2)

Supreme Court, U.S.
FILED
FEB 16 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1242

In The

Supreme Court of the United States

October Term, 1988

JACK R. HUGHES and MERLE A. PETTIT,

Petitioners,

v.

GENERAL MOTORS CORPORATION, a Delaware Corporation, THE GENERAL MOTORS RETIREMENT PROGRAM FOR SALARIED EMPLOYEES, and THE FINANCE COMMITTEE OF GENERAL MOTORS CORPORATION, jointly and severally,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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February 17, 1989

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RULE 28.1 STATEMENT

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New United Motor Manufacturing, Inc. (USA)
Omnibus BB Transportes, S.A. (Ecuador)

RULE 28.1 STATEMENT (Cont.)

Promotora de Partes Electronicos Automotrices (Mexico)
P.T. Mesin Isuzu Indonesia (Indonesia)
Senalizacion y Accessories del Automobil Yorka, S.A. (Spain)
Suzuki Motor Co., Ltd. (Japan)
Unicables, S.A. (Spain)

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COUNTERSTATEMENT OF THE CASE

Petitioners Hughes and Pettit both retired from their employment with the Oldsmobile Division of General Motors Corporation effective May 1, 1980. Prior to their retirements, both Petitioners had conversations with the Oldsmobile Division employee responsible for pension benefit administration to inquire about the possibility that Oldsmobile might subsequently decide to make available retirement benefits (pursuant to a "special early retirement plan") more attractive than the pension benefits to which Petitioners pursuant to Respondents' pension plan otherwise were entitled were they to retire effective May 1, 1980. Petitioners claim they retired only after they were told that no such special early retirement benefits would be made available.

On April 22, 1980, Oldsmobile's general manager authorized extension of special early retirement benefits to Oldsmobile employees who would attain the age of 58 or 59 by August 1, 1980. Neither Petitioner, both of whom would attain the age of 57 only by August 1, 1980, were eligible for the special early retirement plan benefits authorized on April 22.

After Petitioners retired, the special early retirement benefits authorized on April 22, 1980 were extended to Oldsmobile employees that would attain the age of 55, 56 or 57 by August 1, 1980. Because both Petitioners retired on May 1, 1980, neither received any special early retirement benefits, although both received the pension plan benefits due them under the terms of Respondents' pension plan effective May 1, 1980.

Petitioners filed a four-count Second Amended Complaint. In Counts I and II, Petitioners claimed that Respondents' failure to advise them of the unvested, unaccrued, special early retirement benefits under contemplation only at the time Petitioners retired violated §404 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1104 (1982). In Count III, Petitioners claimed that Respondents' communication failure violated §510 of ERISA, 29 U.S.C. §1140 (1982), and in Count IV that Respondents' communication failure violated §502(a)(1)(B) of ERISA, 29 U.S.C. §1132(a)(1)(B) (1982).

The District Court dismissed Petitioners' Complaint by summary judgment. The Sixth Circuit affirmed that dismissal for reasons that differed than those identified by the District Court, concluding that Congress in ERISA neither provided nor intended that Petitioners have any remedy for the communication failure they allege.

REASONS FOR DENYING THE WRIT

1. ERISA §404 provides Petitioners no remedy because that provision imposes fiduciary duties only for the plan's benefit and for plan administration activities, which exclude the contemplation only of new plan benefits

Petitioners' argument that the Sixth Circuit should have allowed them to pursue a claim under §404 of ERISA, 29 U.S.C. §1104 (1982), misses the point of that provision. First, Congress never intended §404 to serve as the basis for benefit or damage recovery by any participant or beneficiary for his own benefit and not for the

benefit of the plan itself. See *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1985).

Even were §404 intended to provide a basis for an individual's recovery for himself, however, that provision imposes no duty on any fiduciary to communicate its contemplation of theretofore nonexistent, unvested, unaccrued pension benefits. Compare §§101-111 of ERISA, 29 U.S.C. §§1021-1031 (1982), where, when Congress had in mind imposing a fiduciary duty of communication to participants and beneficiaries with respect to pension benefits, it declared that duty clearly and precisely. While Congress at §104(b)(1) of ERISA, 29 U.S.C. §1024(b)(1) (1982), did declare a fiduciary duty to communicate pension plan modifications to participants and beneficiaries *following* those modifications, it imposed no corresponding express fiduciary duty in any of those provisions or at §404 to advise of only contemplated modifications.

Most courts that have considered the issue have agreed that an employer is governed by ERISA's §404 fiduciary duties only while engaged in actual plan administration. *See, e.g., United Independent Flight Officers, Inc. v. United Air Lines, Inc.*, 756 F.2d 1262, 1268 (7th Cir. 1985); *Sutton v. Weirton Steel Div. of National Steel Corp.*, 724 F.2d 406, 410-411 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984). *A fortiori*, even an employer that serves an ERISA plan as a fiduciary may negotiate changes in or otherwise contemplate amendments to pension plan benefits – all nonadministration activities – unrestricted by ERISA's §404 fiduciary obligations. *Id.* Thus, Respondents had no §404 fiduciary obligation to communicate with respect to contemplated only benefits.

Berlin v. Michigan Bell Telephone Co., 858 F.2d 1154 (6th Cir. 1988), is not inconsistent with the Sixth Circuit's refusal to permit Petitioners to derive from §404 of ERISA some fiduciary obligation to communicate contemplated only pension benefits. In fact, in *Berlin*, after acknowledging the Sixth Circuit opinion and determinations with respect to Petitioners' claims, the Court distinguished the two cases on their facts and implicitly declared the two opinions consistent. *Berlin*, 858 F.2d at 1162-1163, n.6. The ultimate determinations in *Berlin* and the Sixth Circuit's determination of Petitioners' claims differ not because of any fundamental inconsistent interpretation or application of ERISA but only because the dissimilar facts required dissimilar conclusions.

2. Petitioners' admission that Respondents' plan effective when they retired includes no provision for the benefits they seek precludes their pursuit of an ERISA §502(a)(1)(B) remedy

Petitioners' argument that the Sixth Circuit should have allowed them to pursue a claim under §502(a)(1)(B) of ERISA, 29 U.S.C. §1132(a)(1)(B) (1982), for pension benefits for which Petitioners' acknowledge they have no claim under the literal terms of Respondents' ERISA plan as it applies to them is foreclosed by the unequivocal, unambiguous language of that provision. That is, the essence of Petitioners' claim is that they have incurred damage because, having retired when the benefits they seek were nothing more than unvested, unaccrued, and in fact in Respondents' contemplation only, they have no right to those benefits. That being so, §502(a)(1)(B), as

that provision unequivocally and unambiguously contemplates a civil action only for benefits actually due "under the terms of his plan" and "under the terms of the plan," has no application to Petitioners' circumstance. The Sixth Circuit thus properly refused to expand §502(a)(1)(B) beyond "what Congress has plainly and intentionally provided." *Commissioner v. Asphalt Products Co.*, 107 S. Ct. 2275, 2278 (1987).

3. Petitioners' effort to pursue an ERISA §510 remedy is precluded by the literal language of that provision and has no support in legislative history

Petitioners' argument that the Sixth Circuit should have interpreted §510 of ERISA, 29 U.S.C. §1140 (1982), to provide a cause of action for an employer's failure to accurately advise employees of unvested, unaccrued pension benefits under contemplation only finds no support in the provision's language or legislative history. That being so, the Sixth Circuit properly refused to interpret §510 to provide Petitioners any such cause of action.

It is axiomatic that " 'the starting point involving construction of a statute is the language itself.' " *Southeastern Community College v. Davis*, 442 U.S. 397, 405 (1979). If that language is unambiguous, no resort to legislative history to obtain an interpretation inconsistent therewith is appropriate. *See, e.g., Ex parte Collett*, 337 U.S. 55, 61 (1949). Unless statutorily defined, the courts are to give to unambiguous language its "ordinary, contemporary, common meaning." *Diamond v Chakrabarty*, 447 U.S. 303, 308 (1980) (citation omitted). Any ambiguity, however, is to be resolved consistent with "the legislative history and statutory purpose." *Id.* at 315.

Certainly nothing is ambiguous about §510. The words "discharge, fine, suspend, expel, discipline or discriminate" have an "ordinary, contemporary, common meaning" that by no definition suggest that Congress with that language intended to provide any cause of action to employees that resign their employment not because of any harassment or discrimination, but only because they are unaware that their employer has under contemplation additional unvested, unaccrued pension benefits.

Moreover, were resort to legislative history necessary to interpret §510, that history provides Petitioners no support. Petitioners acknowledge that that history reveals only that Congress intended §510 to protect employees "specifically" against "economic sanctions or violent reprisals" and "the type of harassment which does not say that one is fired, but makes living such a hell that a person wishes he did not have to hang on and endure." *West v. Butler*, 621 F.2d 240, 245 (6th Cir. 1980), quoting from 119 Cong. Rec. 30374, *reprinted in* ERISA Legislative History at 1774-75. That acknowledged intent precluded the Sixth Circuit from giving §510 the interpretation Petitioners sought even were the language of §510 ambiguous.

4. Petitioner's argument for a federal common law remedy if ERISA provides them none requires that the judiciary assume an unauthorized legislative function

Petitioners' argument that the Sixth Circuit should have fashioned for them a federal common law remedy if

ERISA provides them none acknowledges none of this Court's repeated observations of the judiciary's very limited, carefully circumscribed authority to assume that law-making function from Congress, and finds no support in that narrow authority. In fact, the circumstances under which the federal courts may create federal common law are "few and restricted," limited essentially to those occasions "necessary to protect uniquely federal interests" and when "Congress has given the courts the power to develop substantive law:"

> [A]bsent some congressional authorization to formulate substantive rules of decision, federal common-law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases.

Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981) (citations omitted). *See also Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77 (1981); *Wheeldin v. Wheeler*, 373 U.S. 647 (1963).

ERISA includes no congressional grant of authority to the federal courts to create any common law cause of action for conduct Congress has not proscribed. Instead, with ERISA Congress "with . . . evident care" has enacted an "interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a 'comprehensive and reticulated statute.' " *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 146-147 (1985) (citations omitted). Given that comprehensiveness, the federal courts are without authority to create a cause of action that might "upset" such a "carefully considered" program. *Northwest Airlines*, 451 U.S. at 97.

It is true, certainly, that Congress intended that ERISA and its remedies supplant completely state regulation of ERISA plans and that the courts would develop "a body of Federal substantive law . . . to deal with issues involving rights and obligations under [ERISA] plans." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987). It is, moreover, consistent with that intent and no infringement of Congressional authority that the federal courts develop a body of federal common law, or judicial "gloss," as they interpret imprecise ERISA provisions; that authority, however, is no license to create a common law cause of action where Congress provided none for conduct Congress has not proscribed:

> In almost any statutory scheme, there may be a need for judicial interpretation of ambiguous or incomplete provisions. But the authority to construe a statute is fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt.

Northwest Airlines, 451 U.S. at 97.

This Court has previously refused an invitation to imply from §409 of ERISA, 29 U.S.C. §1109 (1982), a cause of action for extra-contractual damages caused by wrongful processing of benefit claims, satisfied that nothing in the legislation or legislative history authorizes the federal courts to fashion such a remedy, even for conduct Congress had expressly proscribed. *Massachusetts Mutual*, 473 U.S. 134. That rationale is equally persuasive here where Congress at §§101-111 of ERISA, 29 U.S.C. §1021-1031 (1982), after presumptively careful deliberation, has established specifically a fiduciary's reporting and disclosure obligations and included nothing requiring the

disclosure Petitioners would have the judiciary require as the basis of a common law cause of action.

Whatever the merit of *Carl Colteryahn Dairy, Inc. v. Western Pennsylvania Teamsters & Employers Pension Fund*, 847 F.2d 113 (3rd Cir. 1988), *cert. denied*, 57 U.S.L.W. 3486 (1989), *Kentucky Laborers Dist. Council Health & Welfare Fund v. Hope*, 861 F.2d 1003 (6th Cir. 1988), and *Whitworth Bros. Storage Co. v. Central States, Southeast & Southwest Areas Pension Fund*, 794 F.2d 221 (6th Cir. 1986), *cert. denied*, 479 U.S. 1007 (1986), those cases provide no support for Petitioners' cause. While in each case the Court did declare a remedy not found in ERISA's provisions, it did so for conduct that indisputably violated an ERISA provision or an ERISA plan. In contrast, Petitioners, who would have had the Sixth Circuit first declare unlawful conduct neither proscribed by Congress nor inconsistent with Respondents' ERISA plan and only then declare a remedy therefor, would have had the Court assume a clearly legislative function.

Petitioners' plea for a cause of action not provided by ERISA appropriately is directed only to Congress:

> The choice we are urged to make is a matter of high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot. That process involves the balancing of competing values and interests, which in our democratic system is the business of elected representatives. Whatever their validity, the contentions now pressed on us should be addressed to . . . the Congress. . . .

Texas Industries, 451 U.S. at 647 (citation omitted). The "equitable considerations" Petitioners advance don't

make Congress any less the appropriate forum for the relief they seek. *Northwest Airlines*, 451 U.S. at 97 n.41.

CONCLUSION

ERISA provides Petitioners no remedy for the conduct they allege. Moreover, Congress has granted the judiciary no authority to create for Plaintiffs any federal common law cause of action. Consequently, the Sixth Circuit properly dismissed Petitioners' claims. On this record, whether that dismissal was best characterized as one for Petitioners' failure to establish jurisdiction or for Petitioners' failure to state a claim is moot.

For all of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 88-1242

In The

Supreme Court of the United States

October Term, 1988

JACK R. HUGHES and MERLE A. PETIT,

Petitioners,

v.

GENERAL MOTORS CORPORATION, a Delaware Corporation, THE GENERAL MOTORS RETIREMENT PROGRAM FOR SALARIED EMPLOYEES, and THE FINANCE COMMITTEE OF GENERAL MOTORS CORPORATION, jointly and severally,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITIONERS' REPLY MEMORANDUM

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ARGUMENT

In Part 4 of their argument in opposition to the petition, Brief in Opp., pp. 6-10, Respondents rely on three decisions of this Court in support of their argument that a federal common law remedy not only *should not* be fashioned to provide some relief to Petitioners, such a remedy *cannot* be fashioned. Respondents' reliance on

these cases is misplaced. The authority to fashion a common law clearly exists and should be exercised here.

The three cases relied upon by Respondents are inapposite. In fact, *Texas Industires, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 101 S. Ct. 2061 (1981); *Northwest Airlines, Inc. v. Transport Workers Union of America*, 451 U.S. 77, 101 S. Ct. 1571 (1981); and *Wheeldin v. Wheeler*, 373 U.S. 647, 83 S. Ct. 1441 (1963), all support Petitioners' position.

Each of these cases deals with the availability of federal common law remedies under statutory schemes or an alleged federal right much less comprehensive than the statutory scheme under the Employee Retirement Income Security Act of 1974 ("ERISA"). *Texas Industries* dealt with an antitrust claim, *Northwest Airlines* dealt with claims under the Equal Pay Act and Title VII of the Civil Rights Act of 1964, and *Wheeldin* dealt with a claim arising out of improper use of a congressional subpoena. These cases did not involve the same underlying considerations presented in a case arising under ERISA.

In each of these three cited decisions the Court used *Textile Workers Union of America v. Lincoln Mills*, 353 U.S. 448, 77 S. Ct. 912 (1957), as an example of a situation where a federal common law remedy *could* be fashioned. *See Texas Industries*, 451 U.S. at 642-43, 101 S. Ct. at 2068; *Northwest Airlines*, 451 U.S. at 96 n. 35, 101 S. Ct. at 1583 n. 35; *Wheeldin*, 373 U.S. at 651-52, 83 S. Ct. at 1445. The distinction between *Lincoln Mills* and the three cases cited by Respondents is of critical importance in the instant case because of the parallel which this Court has acknowledged exists between the preemptive scope of ERISA and the preemptive scope of section 301(a) of the

Labor Management Relations Act, 29 U.S.C. § 185(a). *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56, 107 S. Ct. 1549, 1557 (1987).

Contrary to Respondents' argument, Congress *did* authorize the fashioning of federal common law remedies under ERISA. In his remarks to the Senate in presenting the Conference Report on ERISA, Senator Javits, one of the principal sponsors of ERISA in the Senate and the ranking minority member on the Senate Committee on Labor and Public Welfare, indicated that ERISA was intended to have a very broad preemptive effect and went on to state:

> In view of Federal preemption, State laws compelling disclosure from private welfare or pension plans, imposing fiduciary requirements on such plans, imposing criminal penalties on failure to contribute to plans – unless a criminal statute of general application – establishing State termination insurance programs, et cetera, will be superseded. It is also intended that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans.

120 Cong. Rec. 29942 (1974). A grant of authority to fashion federal common law remedies could not have been given much more explicitly. *See also* H.R. Conf. Rep. No. 1280, 93d Cong. 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 5038, 5107 (actions enforcing rights under ERISA or under benefit plans "are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947"). Congress intended that federal common law remedies be fashioned

to replace state remedies, not that ERISA would extinguish them.

At least four Justices have acknowledged the availability of federal common law remedies under ERISA. In his concurring opinion in *Massachusetts Mutual Life Ins. Co. v. Russell,* 473 U.S. 134, 105 S. Ct. 3085 (1985), Justice Brennan was joined by Justices White, Marshall and Blackmun. In that concurrence, Justice Brennan pointed out the narrow grounds on which *Russell* was decided, 473 U.S. at 150-51, 105 S. Ct. at 3095, and stated that "ERISA was *not* so 'carefully integrated' and 'crafted' as to preclude further judicial delineation of appropriate rights and remedies; far from having such a process, the statute explicitly directs that courts shall undertake it." 473 U.S. at 157, 105 S. Ct. at 3098 (emphasis in original). This case presents the Court with an opportunity to define the scope of federal common law remedies which may be fashioned under ERISA.

CONCLUSION

Respondents do not dispute the fact that, prior to the passage of ERISA, Petitioners' complaint would have made out claims for fraud, misrepresentation and breach of fiduciary duty under the common law of the State of Michigan. Nor do Respondents dispute the fact that ERISA is a remedial statute which is to be construed broadly to effect its remedial purpose. Implicit in Respondents argument, however, is the claim that the effect of ERISA's enactment is to extinguish all remedies under which Petitioners might seek relief.

With a Michigan court already having determined that Petitioners' claims are preempted by ERISA, allowing the Sixth Circuit's decision to stand in the instant case is logically insupportable. A remedy for the wrongs alleged by Petitioners must exist somewhere. According to the legislative history of ERISA and the decisions of this Court, that remedy exists under federal common law. Only a federal common law remedy will provide relief to Petitioners while at the same time avoiding "the threat of conflicting or inconsistent State and local regulation of employee benefit plans" feared by Congress. 120 Cong. Rec. 29933 (1974) (Remarks of Senator Williams).

This case is before the Court to review the trial court's granting of summary judgment in Respondents' favor. Taking the facts in the light most favorable to Petitioners, it must be presumed that Respondents acted intentionally to prevent Petitioners from becoming eligible for special early retirement benefits at a time when those benefits were under serious consideration. For purposes of this Court's review, Respondents through their duly authorized agents intentionally misled Petitioners about these benefits. To allow the Sixth Circuit's decision to stand means that, as Respondents appear to argue, ERISA may be used to protect unscrupulous employers from liability for such actions notwithstanding the fact that ERISA was intended to be "the greatest development in the life of the American worker since social security." 120 Cong. Rec. 29933 (1974) (Remarks of Senator Javits). The result sought by Respondents is totally contrary to the purposes of ERISA.

RELIEF REQUESTED

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

Dated: February 24, 1989

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